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**From:** "Nelson, Barry"  
**Sent:** Wed 1/18/2012 2:15:51 AM  
**Subject:** FW: Follow Up Note on Section 7 Issues

As I hit send, I realized that I had not copied you folks on this note to Don Glaser about BDCP and the requirements of federal law. I'll follow up with Don. Let me know if you would like to discuss any of these issues.

Barry

From: Nelson, Barry  
Sent: Tuesday, January 17, 2012 6:10 PM  
To: Donald R. Glaser (DGlaser@usbr.gov)  
Cc: Obegi, Doug; Poole, Kate  
Subject: Follow Up Note on Section 7 Issues

Don –

Thanks for your comments at our meeting last Tuesday, expressing DOI's intent to clarify the relationships among BDCP, Section 7 compliance and other legal obligations. Your discussion of the CVPIA provided a good example of the need for this effort. You invited additional thoughts from our community. Below are a few issues that we believe would benefit from clarification as you prepare for our next meeting.

BDCP and the Best Available Science: The ISB, the NRC and federal agency staff reviews have all confirmed that BDCP is not yet using the best available science. Our own review has reached the same conclusion. These reviews have raised a wide range of concerns, including, but not limited to, the following:

- A failure to include an appropriate range of alternatives in both the EA and the DEIR/DEIS.
- The inclusion of models and literature that federal agencies have rejected in federal court as not representing the best available science.
- A failure to include a wide range of respected scientific literature on flow and fisheries issues.
- BDCP consultants whose work federal agencies have rejected in federal court as not representing

the best available science.

- A misleading and inappropriate baseline for analysis.
- The lack of SMART goals and objectives (although we are making some progress here) and a failure to design the BDCP program around those goals and objectives.
- The lack of a meaningful adaptive management program.

If the Bureau is to rely on BDCP analysis and proposals in its Section 7 compliance effort, we urge DOI to take steps immediately to address these and other concerns regarding the scientific integrity of the existing BDCP effort. At the moment BDCP documents do not form a credible foundation for federal ESA compliance. We have raised our concerns within BDCP and with the state. However, limited progress has been made to date. We believe that addressing these issues now would reduce the likelihood of delays in the future.

CVPIA: You mentioned the need to clearly state DOI's ongoing responsibility to implement the CVPIA. We agree. As you said, that responsibility is complementary, but additional, to BDCP's efforts to restore the Delta ecosystem and contribute to ESA recovery. As a result, BDCP cannot constrain or pre-empt DOI's response to the "Listen to the River" review or its management of the CVPIA Restoration Fund or B2 water. Obviously, the Restoration Fund is making critical investments in the San Joaquin River, the Trinity, refuge water supplies and other activities that must be kept on track. We are concerned that some interests hope to divert the Restoration Fund to help finance the BDCP program. That would be inappropriate and could have serious impacts on DOI's ability to fulfill its obligations under the CVPIA. In addition, DOI is required to manage B2 water for the primary purpose of anadromous fish doubling – a goal that BDCP has not yet embraced. If BDCP succeeds in obtaining permits, such permits would not limit DOI's management of B2 water.

Assurances. BOR cannot receive Section 10 assurances. This is well known, yet it is often overlooked in BDCP documents and discussions. In addition, Section 10 assurances to DWR cannot constrain BOR's responsibilities in operating the CVP. As you know, we do not believe that the federal contractors can or should receive Section 10 assurances. And finally, BDCP was clearly developed to address ESA and CESA issues only. As a result, BDCP has been designed to leave the State Water Board with additional authority to constrain CVP operations to address issues that go beyond the scope of ESA and CESA issues. This is another issue on which the BDCP has not provided sufficient clarity, setting the stage for possible surprises in the future. We believe that your effort to clarify how BDCP dovetails with other federal obligations provides and opportunity to avoid such surprises.

Upstream Issues. You have consistently stated that the BDCP will be nested in a broader BOR effort to comply with Section 7. In particular, this includes the need to address upstream issues (e.g. carry-over, temperature and Delta inflow) that are not addressed by BDCP. We urge you to include a detailed discussion of this process in DOI's clarification of Section 7 obligations.

A Balanced Process: Over the past five years, the structure of BDCP has made progress on key issues more difficult. As you know, we have raised several concerns about this structure in our comments on the MOA. Resolving some of those concerns will help BDCP produce a viable plan and avoid delays. It will also help DOI

comply with Section 7 in a timely manner. We recommend that these issues be addressed in a NGO MOA or a robust statement of principles that is designed to be parallel in detail and accountability to the MOA. We look forward to working with you on this effort.

San Joaquin River Restoration: We agree with you that the San Joaquin restoration program represents another DOI effort that is additional and complementary to BDCP.

As Jerry said at our meeting last week, we need to find ways to avoid unnecessary surprises in BDCP. It would be far better to provide some clarity now on these issues than to risk delays and unnecessary disagreements down the road. I look forward to discussing these issues with you. Can we set up a time to talk in the coming week?

Barry